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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

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No. 1231
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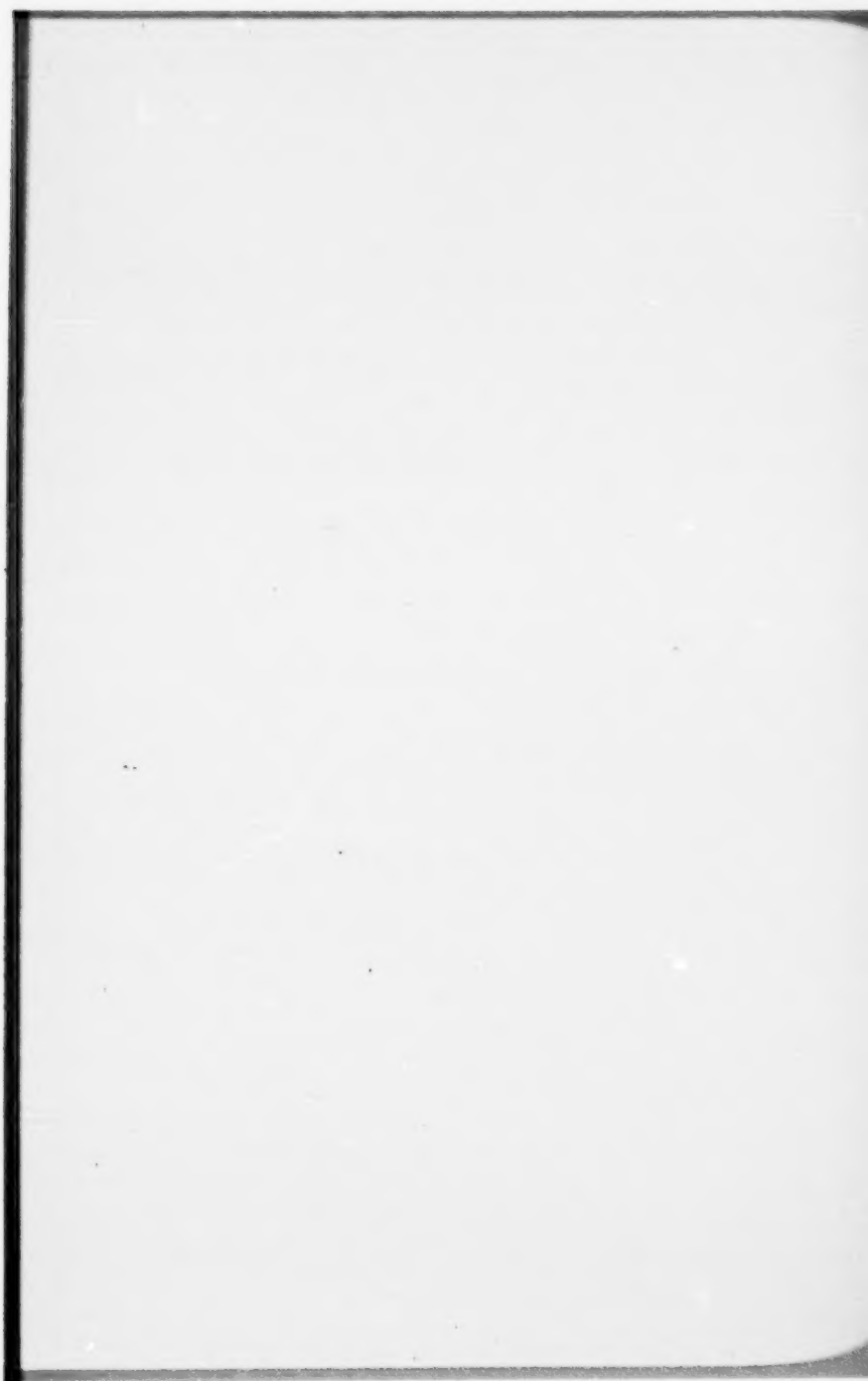
FOREST E. LEVERS, Administrator, etc., *Petitioner,*

v.

A. V. ANDERSON, District Supervisor, Alcohol Tax Unit,
Respondent.

—
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

—
HUSTON THOMPSON,
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Counsel for Petitioner.



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v.

A. V. ANDERSON, District Supervisor, Alcohol Tax Unit,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.**

To the Honorable the Supreme Court of the United States:

The petitioner, Forest E. Levers, special administrator of the assets of a partnership formerly consisting of Forest E. Levers and Ray E. Levers, deceased, duly appointed as such by the Probate Court of Chaves County, New Mexico, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above cause on the 12 day of March, 1946.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 458) is not yet officially reported, nor is the order of that court overruling a petition for rehearing officially reported.

They are found at pp. 458, 465 of the Record.

The orders of the District Supervisor are found at pp. 421, 424, 426 of the Record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 12th day of March, 1946 (R. 458). The petition for a rehearing was overruled on the 27th day of March, 1946. (R. 465).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Heretofore this Court allowed certiorari (325 U. S. 844) and reversed the Circuit Court of Appeals (Advance Sheets SCUS Reports, 90 Law Ed. 22). Upon remand the Circuit Court of Appeals dismissed the appeal on the merits, upon the grounds stated in the opinion (R. 458).

QUESTIONS PRESENTED.**1.**

Whether petitioner acting as a duly appointed, bonded and qualified officer of a court of New Mexico is deprived of his constitutional rights under the twenty-first Amendment to the Constitution of the United States where he is ordered by said court to carry on, as an administrator for said court, the assets of a former partnership and estate, half of which assets belong to the estate, to sell and distribute in intrastate liquors, beers and wines belonging to said partnership and estate, when the officials of the Alcohol Administration cancel his Federal permit and refuse to issue new permits to do a wholesale business within the State of New Mexico.

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2.

Whether petitioner being a duly appointed, bonded and qualified officer of a state court, and placed in charge of the assets of a former partnership as administrator by a state court, can be held responsible for the alleged acts of his predecessors in violation of the provisions of Sections 5(a) and 5(b) of the Alcohol Administration Act (27 U. S. C. A., Sec. 205) to the extent that, as administrator of the said partnership assets, his Federal permit for the sale of liquors, wines and beers belonging to said partnership and estate is cancelled, and permits for carrying on a wholesale business within the State of New Mexico with respect to said former partnership assets and assets of said estate are denied.

3.

Whether petitioner violates the Federal Alcohol Administration Act where the record in no way mentions or refers to the doing of an interstate business and where the transcript of the record does not indicate any direct effect or injury on any interstate shipments, and where the commodities sold by petitioner come to rest in the State of New Mexico, and being in possession of petitioner are distributed by petitioner to retailers within the state under the orders of the state court.

4.

Whether the Circuit Court of Appeals gave due consideration and effect to the provisions of the Twenty-first Amendment in relation to the liquor laws of the State of New Mexico.

5.

Whether the Circuit Court of Appeals gave due consideration and effect to the fact that the conduct of the entire business of petitioner was under the direction and control of a State Court.

6.

Whether petitioner was denied administrative due process because of the extreme severity of the punishment inflicted by the District Supervisor in relation to the lack of gravity of the misfeasance charged.

7.

Whether, under the facts of this case, the action of the District Supervisor in annulling petitioner's permit and in declining to grant the application for two additional permits was not arbitrary and capricious.

STATEMENT OF FACTS.

For approximately twenty years prior to the beginning of this proceeding Forest E. Levers and his brother Ray E. Levers, deceased, were in the business of selling and distributing distilled spirits, wine and malt beverages, covering a period before and after Prohibition, and from March 21, 1936, had a wholesaler's permit No. P-8482 under the Federal Alcohol Administration Act (Act of August 29, 1935, Ch. 814; 49 Stat. 977; 27 U. S. C. A. 201 as amended hereinafter called the Act) and regulations thereunder until October 1, 1941, in the name of Levers Brothers (R. 153).

On October 1, 1941, Ray E. Levers died (R. 154), and upon petitioner's petition he was appointed by order of the Probate Court of Chaves County, dated October 6, 1941 (R. 166, 167) special administrator of the estate of Ray E. Levers, deceased, "... insofar as the partnership assets in the firm of Levers Brothers is concerned" (R. 166). As said special administrator he qualified by posting surety bond in the sum of \$25,000. He was directed and empowered by the Court to continue the business which had been known as Levers Brothers (R. 167). Thereafter, on October 10, 1941, upon application of the deceased's widow,

Oran C. Dale, son-in-law of Ray E. Levers, was appointed co-administrator with petitioner (R. 168, 169), with a surety bond of \$25,000.

The co-administrators applied for and were granted on December 26, 1941 (R. 170) a wholesaler's basic permit No. 13-P-37, which permit was subsequently annulled and the annulment of which is at issue herein.

Thereafter, Oran C. Dale, having been drafted into the United States Army, resigned as co-administrator and was discharged as such by the Probate Court (R. 179), and it became necessary for petitioner to apply for new permits.

Thereupon petitioner as co-partner and special administrator of the estate of Ray E. Levers applied on November 29, 1943, for wholesaler's basic permit to be designated as 13-P-66, and on the same date also applied for an importer's basic permit to be designated as 13-I-12. The aforesaid applications (Nos. 13-P-66 and 13-I-12) were applied for because of the retirement and discharge of said Oran C. Dale from the position of co-administrator (R. 171-177).

At the time of making application for permit 13-P-37 and at all times thereafter, Forest E. Levers, administrator of the estate of Ray E. Levers and Oran C. Dale, and their successors as administrators of the estate of Ray E. Levers, the said partnership assets were under the jurisdiction of the Probate Court of Chaves County, New Mexico and they were "*directed and empowered to continue the business known as Levers Brothers in the ordinary manner, to purchase necessary merchandise, or equipment, and to disburse funds from the said partnership account . . .*" and were ordered to keep "*accurate records of all accounts for submission to and approval*" of that Court. (R. 166, 167)

Petitioner purchased in wholesale quantities all of its liquors, wines and beers from manufacturers outside of the State of New Mexico. The purchases were delivered to depots of petitioner at Hobbs and Roswell, New Mexico where the commodities came to rest. From thence they

were sold and distributed in retail within the State of New Mexico.*

During the aforesaid time, petitioner and his associate administrator made reports to the Federal Alcohol Administration at ~~Albuquerque~~ *Albuquerque, Colorado*, New Mexico, showing the amount of aforesaid commodities received, their sale and distribution to parties named within the State of New Mexico. Similar reports were made at stated times to the liquor authorities of the State of New Mexico.

The State of New Mexico has an "Intoxicating Liquors Act" (Chapter 61, pages 105-1026, New Mexico Statutes, 1941) and at all times since the dissolution of partnership and the application for permit No. 13-P-37, petitioner and his associate administrator were subject to and responded to the requirements of said Act.

On November 5, 1943, respondent, District Supervisor, acting pursuant to Section 4 (e) of the Act, issued an order to show cause why the basic permit issued on December 26, 1941, should not be annulled (R. 146).

The order to show cause why the wholesaler's basic permit should not be annulled charged that the permit was subject to annulment under Section 4 (e) (3) of the Act because obtained by concealment and misrepresentation of material facts relating to the ownership or control of another corporation and to the ownership or control, in violation of Sections 5 (a) and 5 (b) of the Act, of outlets selling alcoholic beverages at retail (R. 146-148).

On December 18, 1943, pursuant to Section 4 (b), respondent issued a notice of contemplated denial of each of the two above described applications (R. 180, 191, 198).

The basis of the charge made in each of the notices of contemplated denial (R. 180-181, 191-193) was that *the evidence in the pending annulment proceedings was persuasive* that the business proposed to be carried on would not be maintained in conformity with law.

In a letter to petitioner giving more fully the reasons for the contemplated denial of petitioner's applications for

* Some merchandise was sold in Texas from the Hobbs Branch. Texas dealers did their own hauling from Hobbs. (See Record page 306)

basic permits, the respondent stated that petitioner's business practices result in control of certain retail outlets for spirits, wines or malt beverages in the State of New Mexico, that such control "affects the purchasing policies of these outlets" as to liquors moving in interstate commerce, and that "Levers Brothers would continue to control the path" of such liquor to their own advantage and the disadvantage of others (R. 198-199).

Petitioner requested a hearing on the order to show cause why the wholesaler's basic permit issued December 26, 1941, should not be annulled and on each of the notices of contemplated denial. The hearings in the three proceedings were consolidated (R. 4-6). After the hearing, the Hearing Officer made a consolidated report containing findings of fact that petitioner had made the misrepresentations charged (R. 377-421). These findings were adopted by the District Supervisor, who then issued an order of annulment, an order denying the application for wholesaler's basic permit, and an order denying the application for an importer's basic permit (R. 421-427).

Basic permit 13-P-37 was annulled on April 5, 1944, and the two applications for permit 13-P-66 and 13-I-12 were denied on the same day (R. 421, 422, 426).

By reason of the annulment of the basic permit 13-P-37 and refusal of the applications for basic permits 13-P-66 and 13-I-12 the said business was threatened with extinction.

The order annulling basic permit No. 13-P-37 on April 5, 1944, was a final order (R. 421, 422, 428).

Throughout their long continuance in the aforesaid business of selling and distributing distilled spirits, neither the petitioner nor Levers Brothers nor Ray E. Levers had ever been convicted of a felony or misdemeanor under a Federal or State law, nor had a permit ever been suspended or revoked for any violation of the Federal Alcohol Administration Act or of the regulations thereunder. Nor had any of the parties been charged with violation of any of the Liquor Laws of the State of New Mexico.

STATUTES INVOLVED.

Applicable portions of the Federal Alcoholic Administration Act (49 Stat. 977, 27 U. S. C. 201) and of the New Mexico Statute of 1941 (Chap. 61, Sections 504-514-518, 911, 912, 914) involved in this case are set out in appendices B and C respectively.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that petitioner violated the Federal Alcohol Administration Act.
2. In holding that the Federal supervisor had the authority to cancel basic Permit No. 13-P-37 and to refuse to grant to petitioner basic permits for the conducting of a wholesale liquor business in the State of New Mexico.
3. In holding that petitioner restrained and prevented transactions in distilled spirits by the other wholesalers in the State of New Mexico and distillers and distributors in other states.
4. In holding that petitioner's transactions had a direct effect upon interstate commerce.
5. In holding that petitioner, an official of a New Mexico court of competent jurisdiction, could be deprived of his rights under the Twenty-first Amendment of the Constitution when he was carrying out the order of the said court in administering the liquor business of a former partnership and estate that were under the jurisdiction of the said state court.
6. In holding that petitioner was doing an interstate business when the commodities which he sold had come to rest in the State of New Mexico and, being in the possession of distributors, were being sold and distributed to retailers within that state under the orders of the state court.

7. In holding that petitioner could be chargeable with the alleged acts of those conducting the liquor business in the form of a partnership in the State of New Mexico under the authority of the said state court when that partnership had been dissolved by death and an administrator appointed by the state court had charge of the assets of the said partnership and was administering them under the order of the said court.

8. In affirming the action of the District Supervisor.

REASONS FOR GRANTING THE WRIT.

The granting of the writ in this case is of paramount importance for the following reasons:

I.

The decision of the Lower Court subordinates the liquor laws of the State of New Mexico to those of the Federal Alcohol Administration Act where intra-state commerce only is directly involved.

II.

The decision of the Lower Court is in direct conflict with the opinion and policy expressed by this Court in the *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293.

III.

The decision of the Lower Court by sustaining the annulling of petitioner's permit No. 13-P-37 and refusing to grant petitioner application for permits Nos. 13-P-66 and 13-I-12 to do a wholesale liquor business in said state has the direct effect of preventing the importation of liquors that come to rest, from being sold under the orders of the Court of Competent Jurisdiction of the State, and thereby does violence to the laws of the State and the rights of a citizen under the Twenty-first Amendment to the Constitution. The decision of the Lower Court has failed to recog-

nize the procedure provided by the State Court under the supervision and jurisdiction of the Court in the protection of intra-state business.

IV.

The decision of the Lower Court in its hypothetical dicta in the opinion assumes a "direct touch" or effect on interstate commerce when the record is void of a direct effect.

V.

The extreme severity of penalties about to be inflicted by the supervisor bear no relation to penalties inflicted in other cases of a like character, and the action of the supervisor, considering the lack of gravity of offense charged, is arbitrary and capricious. Petitioner will, in effect, have been denied due process of law, if they are enforced.

VI.

The decision of the lower court bases its hypothetical effect on interstate commerce, in great part, on the ground that the alleged practices of Levers Brothers, with respect to retail sales, dominated a "*substantial*" number of retailers, whereas out of more than approximately eight hundred sixty retailers in the state, only seven are charged in the record with being dominated by petitioner.

VII.

The Circuit Court of Appeals failed to give proper effect to applicable decisions of this court, namely:

Board of Equalization v. Young's Market Co., 299 U. S. 59, 62

Joseph S. Finch & Co. v. McKetterick, 305 U. S. 395

United States v. Frankfort Distilleries, 324 U. S. 293, 298.

VIII.

Because of the importance of the question involved in the administration of the liquor laws of the United States in their relation to the laws of the several states making provision for effective sale of liquors within their borders.

CONCLUSION.

Wherefore, petitioner respectfully prays that the writ of certiorari may issue.

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Attorneys for Petitioner.

Dated at
Washington, D. C.,
May 15, 1943